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No. 205

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

GERALD A. EUBANK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF

WILLIAM A. SUTHERLAND,
Amicus Curiae.

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MOTION

Now comes the undersigned and moves for leave to file the annexed brief as Amicus Curiae. The undersigned is interested in the decision of this case because he represents a taxpayer who, through personal services, became entitled to a royalty contract giving him a share in the profits to be derived from the distribution of certain copyrighted motion pictures. Immediately upon the completion of the services and before any income arose under the contract, the contract became completely vested in the taxpayer's assignee. The Government now seeks to tax the assignor on the income thereafter arising under said contract and paid to the assignee.

A letter from counsel for the respondent and a letter from the Solicitor General consenting to the filing of this brief has been filed with the Clerk.

WILLIAM A. SUTHERLAND,
First National Bank Building,
Atlanta, Georgia.

BRIEF AMICUS CURIAE

WHERE AN INCOME-PRODUCING CONTRACT IS COMPLETELY ASSIGNED, THE INCOME SUBSEQUENTLY ARISING IS NOT TAXABLE TO THE ASSIGNOR; EVEN THOUGH THE CONTRACT WAS ACQUIRED BY THE PERSONAL SERVICES OF THE ASSIGNOR.

The present case does not involve any attempted assignment of income alone, but an assignment of property from which the income subsequently arose. The assignor's control was gone before any income accrued.

Respondent taxpayer was the owner of a contract entitling him to a certain percentage of future premiums, if any, paid on insurance policies written by him. This contract right was fully vested in him and he had no further services to perform. Before any of the income here in question arose he assigned the contract irrevocably and lost all control of same. The income which was entirely uncertain at the time of assignment ripened after the assignment and came directly to the assignee. The thing here assigned was not income but the thing from which the income flowed.

The Government contends, however, that the decision of this Court in *Lucas* v. *Earl,* 281 U. S. 111, makes the income taxable to the assignor because the contract right in question arose from personal

services of the assignor. The Government rests its case upon that proposition. *Lucas* v. *Earl* does not support it.

Lucas v. *Earl* involved an effort to assign income without the assignment of the thing from which the income arose—in that case, personal services. This Court held that such an assignment would not relieve the assignor of the tax on the compensation. The income remained fully subject to the control of the assignor until the moment of its vesting. In fact as was said by this Court in *Poe* v. *Seaborn,* 282 U. S. 101, 118:

> "The very assignment in that case (Lucas *v.* Earl) was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate".[1]

The same rule applies to the assignment of *income from property,* where an assignment is made merely of the income and the assignor retains control over the property from which the income arises and may thus defeat the assignment. There too income is taxed to the assignor, despite the assignment.[2] In other words wherever there is a mere

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[1] In the case of *Lucas* v. *Earl* the services were to be performed in the future. However, if the services had already been performed and there was the usual cash consideration to be paid therefor, it would no doubt follow from the decision of *Lucas* v. *Earl* that the person performing the services and in whom the right to this consideration had become vested could not relieve himself of tax by thereafter assigning the right to collect the compensation.

[2] See footnote 6, page 12, Government Brief in *Helvering* v. *Horst,* No. 27, and the cases there cited.

assignment of income which is not complete until the income arises—whether the income comes from personal services or from property—the assignor remains taxable on the income. *Lucas* v. *Earl* is merely an application of this sound doctrine.

That this is the proper explanation of *Lucsa* v. *Earl* is clearly recognized by the Solicitor General in the petition for certiorari and in the brief on the merits in *Helvering* v. *Horst,* No. 27, and in other government briefs recently filed in this Court.[3] The Solicitor General there correctly ex-

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[3] In the petition for certiorari in *Helvering* v. *Horst,* No. 27 Oct. Term, 1940, the Solicitor General said:

> "The decision below is not only in conflict with the *Clifford* case, but the court below has ignored the settled rule relating to the assignor's taxability upon assigned future income. *Lucas* v. *Earl,* 281 U. S. 111, in which the rule was first established, dealt, it is true, with the income from personal services. But the basis of the decision is the broad principle that tax liability remains the same whether the income is assigned before or after its receipt; in this doctrine there is no room for distinction according as the future income is derived from the taxpayer's services or his ownership".

The court's attention is directed to the whole of the brief on the merits in the *Horst* case and to the quotation therein from *Reinecke* v. *Smith,* 289 U. S. 172, 177, where *Lucas* v. *Earl* is cited.

In the petition for certiorari in *Helvering* v. *Clifford,* No. 383, Oct. Term, 1939, the Solicitor General said (p. 8):

> "2. An additional ground for the imposition of the tax, wholly apart from the trust provisions in Section 166, is that the instant case falls within the decisions holding that an assignment of future income either from earnings or from property owned by the assignor does not relieve him of lia-

plains that *Lucas* v. *Earl* is equally applicable to income from property and to income from personal services and that the decision is based upon the principle that wherever the fruit and not the tree is assigned, the owner of the tree—be it personal services or property—on which the income ripens is taxable on the income. It should therefore be clear that where as here the thing assigned is not

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bility for tax. This case presents a substantial conflict in principle with those decisions. *Lucas* v. *Earl*, 281 U. S. 111 (earnings from services); *Burnet* v. *Leininger*, 285 U. S. 136 (partnership profits); * * * *Ward* v. *Commissioner*, 58 F. (2d) 757 (C. C. A. 9th) (rents); *Rosenwald* v. *Commissioner*, 33 F. (2d) 423, 426 (C. C. A. 7th) certiorari denied, 280 U. S. 599 (rents); *Bing* v. *Bowers*, 22 F. (2d) 450, 454 (S. D. N. Y.), affirmed 26 F. (2d) 1017 (C. C. A. 2d) (income from property). The significant factor in the foregoing cases of assignments of income from property or property rights is that since the assignor failed to dispose of the underlying property or property rights which produced the income, he could not by anticipatory arrangements deflect such income for tax purposes."

In the brief on the merits of the *Blair* v. *Helvering*, No. 247, Oct. Term, 1936, the Solicitor General said (p. 34):

> "In all these cases, the courts have applied though not always consistently, the general rule that income from personal services is taxable to the one who earns it; that income from property is taxable to the owner or to the one retaining control of the property producing the income, and that any anticipatory arrangement designed in such cases to divert income to another is ineffective to defeat the tax. *Lucas* v. *Earl*, 281 U. S. 111; *Burnet* v. *Leininger*, 285 U. S. 136; *Corliss* v. *Bowers*, 281 U. S. 376."

income, but the thing from which the income arises —the tree itself—the decision in *Lucas* v. *Earl* does not support any right to tax the income to the assignor. In such case, control in the assignor —which was the determining factor in *Lucas* v. *Earl*—is entirely lacking.[4]

In its attempted extension of the doctrine of *Lucas* v. *Earl* to a case like the present the Government is seeking to ignore for tax purposes a complete and absolute assignment of the income producing property from which the income in question flowed, merely because that property came to the assignor by reason of personal services which he had performed. *Lucas* v. *Earl* is not authority for any such proposition. *If* the respondent had attempted to assign the income from renewal commissions contract, *while retaining the ownership and control over the contract from which they flowed,* the decision in *Lucas* v. *Earl* would make the income taxable to respondent.

If we are to tax the owner of the tree on the fruit thereof, we must determine who owns the tree. In the present case the personal services of the respondent taxpayer did not constitute the tree on which the income grew. Those services were completed long before any of the income in question arose and at the time those services were completed it could not be ascertained whether any income would ever arise or what the amount would be. That would depend upon a combination of circumstances which might or might not occur in

[4] It is somewhat surprising now to find the Solicitor General in this case, immediately following the *Horst* case, contending for a construction of *Lucas* v. *Earl* completely at variance with that so recently urged.

the future. The personal services which respondent had performed were merely the seed from which the tree grew. Those services merely perfected the contract right. They did not bring any income into being. Time and future circumstances were required to produce income, circumstances in no way subject to the control of the respondent. Before any income arose the person who had performed the services and produced the contract was entirely out of the picture, and when he stepped out of the picture *he did not assign any income.* There was none to assign. He assigned only a right which might in the future produce income. That was the tree. His personal services were merely the seed. There is no reason to extend *Lucas* v. *Earl* so as to tax the person who supplies the seed.

If the supplier of the seed, rather than the owner of the tree were taxable, when the seed happens to be personal services, the same rule should apply where the seed is property owned by an assignor. For example: Suppose the owner of a laboratory leases the laboratory for six months for $3,000, and an agreement that he will be paid one per cent (1%) of the gross proceeds over a period of ten years to come from any discoveries made during the lease period. Suppose that after the expiration of the lease he assigns the royalty contract to another but makes no transfer of any interest in the laboratory. The principle contended for by the Government would require that the royalties thereafter accruing on said contract be taxed to the owner of the laboratory, a proposition patently erroneous. And yet if the income producing con-

tract is to be ignored and the income therefrom treated as income from the laboratory within the meaning of the cases referred to in *footnote* 2 supra, that conclusion would be required. The effort of the Government here to ignore the income producing contract and to treat the income therefrom as ordinary income from the personal services of respondent is just as unreasonable.

The point is that the *origin* of a contract, such as the renewal commissions contract here in question, is of no importance in determining the taxability of the income therefrom. It matters not whether it arose from personal services of the assignor, or from property still retained by him or from any other source. The income is taxable to the person who owns the contract when the income arises, and *Lucas* v. *Earl* intimates nothing to the contrary. When respondent in this case divested himself of all interest in this contract, none of the income in question had arisen and he had no more control over the income thereafter to arise from such contract, before or after the income arose, than the owner of real estate, after a completed gift thereof, would have over the rents subsequently to arise therefrom.

The distinction between this case and the case of *Lucas* v. *Earl* was clearly recognized by the Court of Appeals for the District of Columbia in the case of *Hall* v. *Burnet,* 54 F. (2d) 443, cert. den. 285 U. S. 552, a case on all fours with the present case, where the court announced the principles properly applicable in the following language (p. 444):

> "From this (the decision in Lucas v. Earl) it is obvious that if what was here

sought to be conveyed from the husband to the wife was salary, or personal earnings, the same would still be taxable to him though he never actually received it, but in the view we take of this case, what was assigned was neither income nor earnings, but property. It was not an assignment of future earnings but the transfer of a property right, and though this property right gave rise to future income, uncertain and contingent though it might be as to amount, that fact does not destroy the distinction. In this case, the contract between appellant and the insurance company gave him a property right in all renewal premiums on all business written for the company by him or by others during the period of the contract. Undoubtedly, his right to these commissions would survive his death and would pass to his estate to the same extent and in the same way as other property which he then possessed. In these circumstances, it is obvious that the right was fixed and certain, and was independent of any future service to be rendered by him. Any uncertainty in the situation concerned only the amount; but the agent's rights as against the insurance company were established. When, therefore, the contract was assigned to his wife, a property right passed to her, as capable of assignmet as any other sort of property; for instance, as rents to accrue from a lease for a term of years, or royalties from a patent."

The correctness of this decision was recognized by the 7th and 6th Circuits in the cases of *Bishop* v. *Commissioner,* 54 F. (2d) 298, and *Parker* v. *Routzahn,* 56 F. (2d) 730, cert. den. 287 U. S. 606; and it is difficult to understand the basis upon

which the correctness of the decision was questioned by the 8th Circuit in *Van Meter* v. *Commissioner,* 61 F. (2d) 817, in view of the fact that thta court expressly recognized the correctness of the decision in *Nelson* v. *Ferguson,* 56 F. (2d) 121, cert. den. 286 U. S. 565.[5]

Taxation, as this Court has frequently said, *is a practical matter. Practicality,* as well as fairness, *dictates that the judgment below be affirmed.*

It is entirely fair and practical that a person owning property or performing services should pay tax on the income therefrom, even though he permits others to enjoy the income. On the other hand, it would be entirely unfair and impractical to tax an assignor on income arising from a contract or property—from whatever source that contract or property arose—where the property or contract and all control thereof has passed entirely out of the assignor long before it is even determined what income if any will ever arise therefrom. Take these insurance renewal commission contracts for example. Generally commissions are payable for nine years after the agent has severed his connections with the company. If the Government's theory is correct, an agent who has completed his services and has completely disposed of his contract could be taxed on income arising from the contract nine years after the complete assignment, although the amount of the commissions was entirely uncertain at the time of the assignment. Such a result is as undesirable as it is unfair, and

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[5] See the discussion of these insurance commission cases in the Respondent's brief in opposition to certiorari.

this Court certainly has not said anything in any of its previous opinions which could lead anyone to believe that it considers that the income tax law requires a holding so out of keeping with economic reality.

The Government suggests that the affirmance of the decision below will afford an alarming opportunity for tax avoidance. The right to transfer a contract of this character, and thus to shift the income for tax purposes to the assignee, affords no greater opportunity for tax avoidance than does the right to transfer any other income producing property or contract. In each case taxes are avoided only by the complete surrender of the property which gives rise to the income.

CONCLUSION

The decision of the Court below is in accord with the weight of authority, is correct, and should be affirmed.

Respectfully submitted,

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